Appendix A

Department of Commerce

Office of the Secretary

MARITIME SUBSIDY BOARD DOCKET NO. S-121

STATES STEAMSHIP COMPANY—
APPLICATION TO CALL AT HAWAII

Permission of the Maritime Subsidy Board under section 805(a) of the Merchant Marine Act, 1936, is not required where a subsidized operator in foreign trade wishes to make intermediate calls at Hawaii on the subsidized voyages, since sections 605(a) and 506 grant express permission for such mixed voyages and provide protection, deemed by Congress to be adequate, for exclusively domestic carriers through the pro-rata reduction and refund of subsidy for the domestic portion of the mixed voyage.

James L. Adams, Gordon L. Poole, and Edward M. Kovach for Applicant, States Steamship Company.

Herman Phleger, Alvin J. Rockwell, Willis R. Deming, George D. Rives, and John E. Sparks for intervenor, Matson Navigation Company.

John T. Rigby, Bert T. Kobayashi, Attorney General, Arthur S. K. Fong, Assistant Attorney General, and Richard S. Sasaki for Intervenor, The State of Hawaii.

Aaron W. Reese, Port Attorney, for Intervenor, San Diego Unified Port District.

RECOMMENDED DECISION OF E. ROBERT SEAVER, REVIEW EXAMINER

This is a review by the Secretary of Commerce, under section 7.01 of Department Order 117 (Revised), of the decision of the Maritime Subsidy Board (the Board) granting the request of States Steamship Company (States) for permission under section 805(a) of the Merchant Marine Act of 1936 (the Act) to increase its intermediate service between California and Hawaii from 13 to 26 calls per year in each direction on the sailings in its subsidized operations on Trade Route 29, between ports in California and the Far East.

States presently has the right and the obligation, under an operating differential subsidy contract with the Government, to make a minimum of 24 and maximum of 30 subsidized round voyages per year in its "B service" (between the Pacific Coast and the Far East) and a minimum of 24 and maximum of 28 in the "C service" (between California and the Far East). The contract presently permits calls at Hawaii on 13 voyages per year in the C service. States now desires to call at Hawaii fortnightly, rather than monthly, in each direction with its C service vessels, and wants the incidental right to fill in the schedule with B service vessels once or twice a year if this becomes necessary in order to make the 26 Hawaiian calls on a regular schedule. Six ships—Victories and C-3's—are used in the B service. Five are used at present in the C service consisting of Mariners and C-3's. If the request is granted, all the calls in the C service will be made by Mariners, which are among the world's fastest and largest cargo liners.

The plan, then, if the 13 additional calls may be made, is to provide service on each of the bi-weekly C-service voyages:

(1) From California ports to Hawaii in the off-shore domestic commerce,

(2) from California to Far East ports in the foreign commerce,
(3) from Hawaii to the Far East in the foreign commerce,
(4) from Far East ports to Hawaii in foreign commerce,
(5) from Far East to California in foreign commerce, and
(6) from Hawaii to California in domestic commerce.

The vessels employed in these services were built with the aid of construction subsidy provided by the Government under Title V of the Merchant Marine Act, 1936 (46 U.S.C. 1151 et seq.) and they are operated with the aid of an operating differential subsidy provided under Title VI of the Act (46 U.S.C. 1171, et seq.). However, the operating subsidy is eliminated and the construction subsidy refunded for the domestic phase of the voyages, on a pro-rata formula contained in sections 605(a) (46 U.S.C. 1175) and 506 (46 U.S.C. 1156), respectively, of the Act.

Matson Navigation Company (Matson), for many years the dominant carrier in the Pacific Coast/Hawaiian trade, intervened in the proceeding to resist the grant of permission. The State of Hawaii and the San Diego Unified Port District also intervened, the former objecting to the request and the latter supporting the request. Public Counsel took a position in opposition to the request, but they are not participating in this review.

The Procedural Events Leading to This Review

A protracted hearing was held before a Hearing Examiner of the Board pursuant to section 805(a) of the Act which, if applicable, requires a hearing before the requested permission may be granted and findings that the additional calls would not result in unfair competition to exclusively domestic operators or be prejudicial to the objects and policies of the Act. The Examiner issued a recommended decision that was favorable to Matson,

in most respects. It permitted the requested increase in calls from San Diego to Hawaii. It permitted the increased calls from the other California ports only on the condition that Matson should have the first refusal of all cargo, States to lift only that cargo that Matson could not lift within two weeks after a request for space by the shipper. It denied permission to increase the inbound calls from Hawaii. It may be noted here that Matson abandoned the San Diego service in 1960 because it felt that the cargo offered was insufficient to justify any calls. States has made a few calls at San Diego each year. Matson raised no objection to the grant of permission for the increased westbound calls at San Diego. All of the parties, including Public Counsel, filed exceptions to the recommended decision and the Board undertook to review the decision, as it was required to do under its rules.

The Board rejected the recommended decision of the Hearing Examiner and granted the requested permission, having found that the additional calls would not violate the standards of section 805(a). Matson and the State of Hawaii sought and obtained review of the Board's decision by the then Secretary of Commerce under section 7.01 of Department Order 117 (Revised). The unsuccessful parties brought an action in the District Court for the District of Columbia to obtain judicial review of the decision of the Secretary. The other parties intervened in support of the Secretary's decision. At that state of the proceeding, the then Secretary learned that certain *ex parte* communications had come before officials of the Department participating in the review of this case. He determined that, while innocently made, the communications might have prejudiced one or more of the parties.

Because of these communications, the former Secretary filed in the District Court a motion to remand the proceeding to the Secretary for the stated purpose of setting aside his own decision and designating a Review Examiner, outside the Department, to review the Board's decision and prepare a recommended decision

for the Secretary. The parties all consented to the motion and it was granted by the Court. Upon the request of the Secretary, the Civil Service Commission designated the undersigned, a Hearing Examiner of the Federal Maritime Commission, to serve as the Review Examiner in accordance with section 11 of the Administrative Procedure Act (5 U.S.C. 1010), and the Secretary appointed the Review Examiner. This review of the Board's decision is based on the record heretofore made in this proceeding, the briefs and arguments of counsel, and a few relatively minor matters stipulated by the parties at a "pre-review" conference.

It should be noted, particularly, that the then Secretary determined, with the agreement of the parties, that his decision was to be set aside and not cited nor considered as a precedent in the further proceeding in this case.

I. *The Principal Issue: Is Permission of the Agency Under Section 805(a) Required in Order for a Subsidized Operator to Engage in a Service Expressly Authorized by Sections 605(a) and 506 of the Act?*

The entire text of the three sections of the Act that are in question is as follows:

> SEC. 506. Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Commission that proportion of one twenty-fifth of the construction-

differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Commission may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the Commission, upon such terms and conditions as it may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Commission as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

SEC. 605 (a) No operating-differential subsidy shall be paid for the operation of any vessel on a voyage on which it engages in coastwise or intercoastal trade: *Provided, however,* THAT such subsidy may be paid on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States or a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and if the subsidized vessel earns any gross revenue on the carriage of mail, passengers, or cargo by reason of such coastal or intercoastal trade the subsidy payment for the entire voyage shall be reduced by an amount which bears the same ratio to the subsidy otherwise payable as such gross revenue bears to the gross revenue derived from the entire voyage. No vessel operating on the Great Lakes or on the inland waterways of the United States shall be considered for the purposes of this Act to be operating in foreign trade.

SEC. 805 (a) It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII

of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided,* That if such contractor or other person above-described or a predecessor in interest was in bona fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

Sections 506 and 605(a) permit stops at Hawaii on voyages of the subsidized vessels in foreign trade. Interveners Matson and the State of Hawaii contend, in essence, that sections 605(a) and 506 must be read to mean that subsidies *may not* be contracted for as to the mixed foreign and domestic voyages permitted by these sections *unless* the contractor first receives permission for such calls from the Board under section 805(a), after an administrative hearing and favorable findings on the standards set out in that section. States urges that since sections 605(a) and 506 permit payment of subsidy on foreign voyages which include stops at Hawaii, permission under section 805(a) is not required for such voyages of the subsidized vessels. That section, they say, refers to voyages of other vessels of the contractor or his affiliates. A careful study of the Act and an appraisal of the intention of Congress lead to the conclusion that permission under section 805(a) is not required in the circumstances of this case.

Under the rule that, if possible, the legislative intent must be drawn from the plain meaning of the words used in the statute, the words "may be paid" in section 605(a) must be taken to mean what they say, rather than "may not be paid, unless - - -", as contended by Matson, unless a contrary Congressional intention is clearly evidenced by the language of section 805(a), by the legislative history, or otherwise.

The question is one of considerable concern to the two steamship lines involved here, although for reasons discussed later it is not the life and death matter Matson contends. The objective, in resolving a disagreement over the construction of a statute, is to ascertain the Congressional intention as to its meaning. The accepted method employed in learning this intention is, *first,* to look at the language of the statute, construing it in such a way that harmony between sections of an entire Act of which it is a part is achieved; *second,* to examine the legislative history if the language of the statute is conflicting or for some reason does

not provide a reliable guide to the Congressional intent; and, *third,* this step being intertwined with the first two, to apply pragmatic considerations that can be deemed to have influenced Congress. *United States v. American Trucking Assns.,* 310 U.S. 534, 543 (1940); *United States v. National Marine Engineers' Ben. Assn.,* 294 Fed. (2nd) 385, 391, (C.A. 2, 1961). The overall ends sought to be achieved by Congress must be used as the guiding light through each of the steps. The following discussion of the three pertinent sections of the Act is taken up in the order of the three above steps, after a description of the overall objectives of the Merchant Marine Act, 1936.

Overall Objectives of the Merchant Marine Act, 1936.

Section 101 of the Act (46 U.S.C. 1101) sets forth the "National Shipping Policy" and provides a statement of the goal sought to be achieved by the Act:

> SECTION 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

This statement of the goal is not unlike that expressed in 1920 in the enacting clause of the Merchant Marine Act, 1920 (46

U.S.C. 861) adopted by reference in the 1928 Act (46 U.S.C. 891); but the means for reaching the goal was entirely new in the 1936 Act. The old ocean mail contracts were discarded for a new system of Federal financial assistance, made available primarily for the construction and operation of ships, which was intended to place the citizen owners and operators of American flag vessels on a parity with their foreign competitors. The concept of *parity* is the key to the formula developed in the 1936 Act, as evidenced by the following portion of the Report of the Committee on Commerce of the Senate, 74th Congress, 2nd Session, on S. 3500, Report No. 1721, page 7. This clear and succinct resumé also makes it clear that the "subsidy" payments were not designed as a dole or gift to the operator, as Matson contends. The payments were not deemed to place the operator in such a position of economic strength, vis-a-vis the domestic ocean carrier, that the balance could not be equalized through the elimination of the subsidy for the period the operator was engaged in domestic trade.

> The financial assistance required to adjust the construction differentials is for the purpose of equalizing the difference between American and foreign cost. It is not paid to the ship operator. It is paid to the shipbuilder and represents the difference in cost between American and foreign ship from which American labor benefits. Since approximately 85 percent of the cost of constructing a ship is labor, therefore labor is the chief beneficiary. It is wholly desirable that American wage scales and standards of living be maintained in shipbuilding for foreign trade. The profits of the shipbuilder in the transactions are adequately restricted by recapture.
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> The operating differential is paid to the ship operator. The amount of this so-called operating subsidy is primarily limited to a repayment of sums of money which he has already disbursed in payment for the American labor employed upon his American ship and for the American materials

> required in its maintenance and operation. This labor and these materials cost more under the American flag than they would have cost under a foreign flag. The repayment or reimbursement to the operator of the excess cost is not, therefore, in any sense of the word, a subsidy. It is merely an equalization of his American costs as against the costs of foreign-flag operation. There can be no profits to the ship operator in the repayment to him of these out-of-pocket excess expenses which he has already incurred. For this reason, many of the restricting and limiting provisions contained in this bill may seem unnecessary, but are inserted to make sure there can be no recurrence of the alleged abuses made possible by deficiencies in the act of 1928. It is the purpose of this bill to endeavor to place the American owner and operator of an American flag ship on a competitive parity with his foreign-flag competitor. "Parity" carries with it no guarantee of profits, and if there are to be any profits, they must be made in competition with foreign shipping.

The same principle of *parity* was the objective in finding the proper competitive balance between the operator of vessels exclusively in the domestic commerce and the subsidized operators in foreign commerce who made incidental calls at island territories under the permission granted in section 605(a). In Commerce Committee Report No. 1721, cited above, the Committee displayed concern for the exclusively domestic carriers when it spoke of the refusal to permit vessels built with construction subsidy to engage in any joint foreign and coastwise trade (page 15) or the payment of operating subsidy in any such trade (page 18). It must be noted, however, that in each of these passages of the Report the Committee made an exception to permit calls by subsidized vessels at our "island possessions". It was the intention of Congress to achieve the desired parity between the subsidized operator engaged in such mixed trading and the exclusively domestic carrier by means of the clauses in section 605(a) and 506 which eliminate the payment of subsidy, pro-rata, while the subsidized vessels are engaged in domestic trade.

Appendix

The Language of Sections 506, 605, and 805(a) as a Guide to the Intent of Congress

There are patent inconsistencies in these sections of the Act if they are interpreted to cover the same vessels and services. The only support for the interpretation of section 805(a) urged by Matson is the use of the phrase "any vessels" in section 805 to describe the ships whose domestic trading gives rise to the requirement of permission. To read this phrase literally and out of context, in this way, results in conflicts within the section and with other sections.

1. Sections 506 and 605(a) contain very precise requirements for refund and reduction of subsidies, in the event the permitted mixed trading is pursued, based on a carefully worked-out formula which is geared to relative gross profits in the two types of trading, taking into account the statutory 25-year life of the vessels. If 805(a) is deemed to cover the same vessels and services, this formula cannot be reconciled with the general prohibition against diversion of subsidies contained in the last paragraph of 805(a). There is no evidence in the draftsmanship throughout the Act that its framers were capable of such redundancy.

These two provisions with respect to operations in domestic trades are patently designed to cover entirely different circumstances. The earlier sections are clearly related to the operation of subsidized vessels. On the other hand, section 805(a) is just as clearly designed to govern the contractor's use of a separate service, or the use of subsidiaries and the like, in the domestic commerce. Unless this dichotomy of objectives, and of the means employed to meet them, is recognized, section 805(a) is out of harmony with sections 506 and 605(a).

2. A reading of the entire Act demonstrates that its creation involved legislative draftsmanship of the greatest complexity, since it sets forth a wholly new program, covering an entire

industry, and putting into words the resolution of conflicting desires of various segments of the industry, shippers, and the public. Such a reading also shows that the draftsmen who prepared the text were quite adept at using statutory language to reflect every sort of condition, proviso, exception, exclusion and other restricting and limiting devices. It seems certain that if the intention was to have sections 605(a) and 805(a) cover the same circumstances, or overlap in their coverage, we would see in section 805(a) the clause "subject to the provisions for reduction of subsidy contained in section 605(c)"; and 605(c) would surely have said "subject to obtaining the permission required by section 805(a)."

3. The unambiguous language of section 605(a) states that "subsidy may be paid on a - - - voyage in foreign trade on which the vessel may stop at the State of Hawaii." There is a patent conflict between the two sections if they are deemed to cover the same situations, for section 805(a) states that it shall be unlawful to pay any subsidy if the contractor "shall - - - operate any vessel - - - in the domestic intercoastal or coastwise service."[1] For this reason alone section 805(a) cannot be read to cover the use of subsidized vessels in domestic service. One of the canons of statutory construction requires that the various sections of an act be construed so as to give harmony, rather than conflict, to the whole. *National Labor Relations Board v. Lion Oil Co.*, 352 U.S. 282 (1957).

4. If section 805(a) were intended to cover subsidized vessels and operations it would not have been confined to Title VI, which covers *operating* subsidies; it would also have required permission for the use in domestic trades of vessels that had been *built* with construction subsidy under Title V. It should be noted in this connection that section 506 permits the construction subsidy ves-

1. The "intercoastal or coastwise service" has been held to include calls at Hawaii, *Pacific Far East Lines v. Federal Maritime Board*, 275 Fed. (2nd) 184, (C.A.D.C., 1960).

sels to be operated temporarily in the exclusively domestic trade, provided the consent of the Board is first obtained (and the last sentence prohibits payment of operating subsidy for the temporary period). Section 805 is therefore completely unnecessary insofar as subsidized vessels are concerned. It merely duplicates the permission required by section 506, unless it is recognized that 805 was intended to refer to ships other than the subsidized ships. Sections 506 and 605(a) round out the complete Congressional plan for the treatment of vessels either constructed or operated with subsidy, insofar as the area of operation is concerned. These sections, and no others, deal particularly with trading areas of subsidized vessels, while section 805(a) provides general coverage of non-subsidized vessel ownership, operation, etc. by the contractor, affiliates, etc., that compete with domestic carriers. The latter must be construed to cover vessels and services other than those that are subsidized under the rule that in statutory construction the particular provision governs over the general. *Mac Evoy Co. v. United States,* 322 U.S. 102, 107 (1944); *Karrell v. United States,* 181 Fed. (2nd) 981, 986, (C.A. 9, 1950).

5. The inclusion of the "grandfather clause" in section 805(a) is also revealing as to the vessels and operations intended to be covered. If the section is construed so as to include the voyages of the vessels covered by operating subsidies, the owner of those subsidized vessels that qualified under grandfather rights could enter the trade between New York and Norfolk with subsidized vessels without even having to pass muster under the unfair competition and "public interest and convenience" test contained in the statute, and without a reduction of subsidy except insofar as the "diversion" clause might apply. No one would contend that such an intention could be attributed to Congress. The reference in this clause to "trades for which application is made" necessarily refers to application for permission under section 805(a), for there is no provision for applications for subsidy in domestic operations.

6. When 805(a) requires "written permission" to engage in certain services, it cannot be deemed to refer to those four mixed services expressly permitted by section 605(a), because the manifest plan of the Act is that those voyages will be authorized by contract. "Written permission" is something entirely apart from the "contract" entered into under Title VI. All services and voyages that a subsidized operator is permitted to perform and to make are covered in detail in the Operating Differential Subsidy Contract. This includes the intermediate calls at Hawaii. "Written permission" under section 805(a) covers something else, as it would be idle to duplicate the contract terms with a "written permission".

7. Sections 506 and 605(a) contain flat prohibitions against contracting for or paying subsidy on domestic voyages other than the four mixed voyages enumerated in these sections. If voyages of the subsidized vessels themselves were deemed to be covered by section 805(a), there is nothing in that section to prevent the Board, after hearing and making the stated findings, from granting permission to use the subsidized ships in the service flatly prohibited by the earlier sections and the contractor would not even be subject to the refund of subsidy provision of 506 and 605(a).[2] The inconsistency is apparent. Matson acknowledges in a footnote on page 34 of its reply brief to the Hearing Examiner, "Obviously, only a separate [from the subsidized vessels] exclusively domestic service could be so authorized [under section 805(a)]." This is tantamount to saying that the "any vessel" provision in 805(a) cannot be read literally.

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2. Sec. 714 of the Act contains provisions governing the trading areas of vessels chartered from the Government that are similar to those in sections 506 and 605(a). It cannot be said that section 805(a) was intended to cover the operation of these vessels simply because it covers "any vessels" chartered for use in the domestic service. The phrase could not have been meant to refer to the Government vessels chartered under section 714 for they are chartered for use in the foreign trade, solely by the contractor and not by any affiliates, et cetera. Thus the section 714 restraints and permissions stand alone, like those of section 605(a), not subject to or expanded by a grant of permission under 805(a).

In view of the conflicts between the sections of the Act that would result if they are construed as Matson contends, there is justification, indeed a need to turn to the legislative history of the Act. *Harrison v. Northern Trust Co.*, 317 U.S. 476, 479 (1943).

A detailed study of the legislative record does not require or permit the conclusion that section 805(a) must be construed to cover subsidized vessels and operations, regardless of the conflict such a construction would cause. Instead, the legislative history provides strong reinforcement of the view that Congress intended that intermediate calls of operating subsidy vessels at domestic ports be governed exclusively by sections 605(a) and 506 and that permission under section 805(a) was not intended to be required in these circumstances.

Under the Merchant Marine Act, 1928, ocean mail payments —a form of subsidy that was superseded by that authorized in the 1936 Act—were made on voyages such as those States seeks to make, even including the days spent on the domestic leg. The initial bill leading to the 1936 Act (S. 2582, 74th Congress, 1st Session) authorized subsidies for the operation of ships to be used in the "foreign commerce of the United States" (Sec. 505).[3] Foreign trade was defined (Sec. 1010) as trade between the United States, its territories and possessions, and a foreign country. In keeping with the scope of the 1928 Act as to trading areas, the definition continued (page 17):

> The loading or unloading of cargo, mail, or passengers at any port in any territory or possession of the United States shall be deemed to be foreign trade if the stop at such territory or possession is an intermediate stop on what would otherwise be a voyage in foreign trade - - -.

3. Found on page 7 of Hearings before Senate Commerce Committee on S. 2582, April 25 and 26, 1935.

In this bill, there was no prohibition to protect against the subsidized operator entering the domestic trade through the device of employing separate, non-subsidized vessels or services, or forming an affiliated company for this purpose. Protests from domestic operators who testified before the Congressional committees apparently convinced those in charge of the legislation that such protection was needed. Other witnesses pointed out that it was inconsistent with the principle of preventing subsidy for ships in domestic trade for the definition of "foreign trade" to include the domestic portion of a mixed voyage. However, a domestic operator testified that stops at Hawaii on the trans-Pacific service presented "a different situation" from the New York/Baltimore/Puerto Rico trade that he served.[4] This same view had been expressed in the May 13, 1935 report of the Special Committee to Investigate Air Mail and Ocean Mail Contracts[5] on page 15:

> It is apparent that not only has this company [referring to an ocean mail contractor who had heavy investment in a domestic operator] placed the profits from postal contracts in competition with unsubsidized American-flag enterprises, but that by so doing it has deprived itself of funds which might otherwise have been available for replacing vessels which will be worn out upon the expiration of the postal contracts.
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> Operators in what is known as the "nearby-foreign" trade, which is semi-protected [other passages identify this as the Central American and Caribbean areas], are also extensively aided by postal contracts at the expense of their unsubsidized American competitors.

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4. Senate Committee on Congress, Hearings on S. 2582, 74th Congress, 1st Session (1935), p. 229.

5. Senate Report No. 898, 74th Congress, 1st Session. See also the Report of the Postmaster General to the President found at p. 1103 of Hearings Before House Committee on Merchant Marine and Fisheries, 74th Congress, 1st Session, on H.R. 7521.

This passage and Report No. 1721, discussed on page 9,[5a] supra, show the two separate problems that required the inclusion of the respective sections under study. The first paragraph expresses concern over abuses not involving the use of the subsidized ships. The second paragraph dsecribes certain problems incident to the operation of the subsidized ships themselves. Most significant, however, is the reflection of the view that mixed trading involving intermediate calls at Hawaii on voyages in the distant Far East trade was not the same problem *with regard to unfair competition* as that where the subsidized operator engaged in domestic voyages that included calls in the "nearby-foreign" trade. The solution to these problems appears in the formula incorporated in section 605(a) and 506. That is, no calls are permitted in domestic commerce except those on the four, named, distant trades, with a reduction and refund of subsidies for the domestic portion. The subsidized operator is, at the outset, flatly excluded from any domestic service in connection with calls at such "nearby-foreign" trading.

The separate solution of the separate problem of the use of affiliates or vessels and services separate from those that are subsidized was accomplished by section 805(a).

The first version of what became section 805(a) was an amendment offered by Senator Black to S.2582 (79 Cong. Rec. 6499) which provided:

> Sec. 511.(a) No contractor under a contract in force under this title, or no holding company of such contractor or no officer, director, or executive, or no member of the immediate family of any of such officers, directors, or executives of such contractor or such holding company, shall (1) own any pecuniary interest in any person performing or supplying stevedoring, terminal, ship-repair, ship-chandler, towboat, wharfage, or kindred services in any domestic port or ports.

5a. On p. 19, the Senate Committee describes the activities which came to be covered by 805(a) as "any interest" in "the coastwise business."

(2) Own any pecuniary interest in any person servicing any vessels of the contractor in a foreign port or ports: *Provided,* That, with the express approval of the Authority, such contractor, or a wholly owned subsidiary of such contractor, may render services to vessels in a foreign port or ports if the profits, if any, incident thereto are included in the earnings contemplated in section 505 (c) of this Act. (3) Own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest in any person that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service. (4) Own, charter or operate any foreign-flag vessel or vessels, or own any pecuniary interest in any person that owns, charters, or operates any foreign-flag vessel or vessels. (5) Perform or supply at any domestic port or ports, stevedoring, towboat, ship-repair, ship-chandler, terminal, or wharfage services for any vessel: *Provided,* That such contractor may itself, with the express approval of the Authority, perform stevedoring services to and/or utilize its own terminal and/or wharfage facilities for its own vessels. (6) Own any pecuniary interest in any person employed as agent or broker for any contractor under a contract in force under this Act.

Clause (3) is the prohibition against engaging in domestic intercoastal or coastwise service, "or own[ing] any interest in any person" who does so. It is significant that this is one of a series of six activities, all of which are separate and apart from the actual operation of the subsidized service. It is a list of peripheral activities that are denied to the recipient of subsidy. Clause 3 cannot be read as applying to the operation of the subsidized ships themselves any more than could clause (4), for example, which refers to the operation of foreign flag ships. Thus the operation of vessels referred to cannot logically be taken to mean the subsidized vessels. This is particularly true because of the inclusion in the prohibition of owning "an interest in any [other] person" that operates the ships. Such persons will not be operating the subsidized ship, so the section must refer to other ships.

The dichotomy in the purposes of sections 605(a) and 805(a) is evident even at the inception of the latter, for S.2582 permitted subsidized ships to engage in specified mixed trade and required a reduction and refund of subsidy (section 504 and 507(d))[6] in the version before the Senate at the time Senator Black introduced his amendment. He did not propose a change in these provisions.[7] The prohibitions in his amendment were therefore intended to apply to other vessels—not those that were subsidized.

The legislation went through various hearings, revisions, and refinements in both houses during the course of which the unbroken thread of purpose in section 805(a) as distinct and separate from that in 605(a) and 506 was woven into the legislative record. For example, during the Senate Committee hearings on S.3500, Mr. J. S. Peacock, Director of the Shipping Board Bureau, who participated extensively in the hearings, testified on March 10, 1936, and was asked by Chairman Copeland, (page 87 of Hearings):

> I notice in this paragraph I just read [section 805(a)] that you prohibit any pecuniary interest of the contractor in the coastwise business except on permission of the Authority and after public hearing. What situation is there that you know of in the shipping industry today that prompts the necessity for this provision.

Mr. Peacock explained that it was for the protection of those persons engaged exclusively in the domestic trade. In answer to another question, he stated that the bill does not provide any subsidy for strictly coastwise trade. Senator Bachman then stated, "But the Authority is given permission to grant it." To this Mr. Peacock replied that the permission here [the subject was a version

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6. Found on pages 7 and 9 of the Senate Committee Report on S. 2582, cited in footnote 4.

7. See also letter to the Chairman of the House Merchant Marine Committee dated May 9, 1935, from the Assoc. of Am. Railroads at page 943, Hearings on H. R. 7521, 74th Congress, 1st Session.

of 805(a)] referred to permitting a subsidized foreign trade operator also to operate *separately* and *independently* in intercoastal service. Matson raises questions as to the conclusiveness of this statement in view of the fact that Senator Bachman said, "I did not so construe it." Apparently the Senator was referring to his obviously erroneous understanding that the Authority was "given permission to grant" subsidy in the strictly coastwise trade. In any event, his statement does not reflect dogmatic disagreement. It is more in the nature of the expression of a previous and now abandoned view.

Matson points out the fact that certain progenitors of sections 506 and 605(a) required Commission approval for the mixed trading covered in those sections and in the same version of the legislation the forerunner of section 805(a) also required permission, and concludes that this is evidence that all three sections were intended to cover the same vessels and operations and that the permission sections were removed from the former as being duplication and therefore unnecessary. There being nothing in the legislative record to support this view, it is more logical to conclude that the permission and hearing provisions in the early version of 506 and 605(a) were omitted because they were rejected outright by Congress. The very nature of these two sections is such that they could be automatic in their application to all subsidized operations and self-executing. Congress chose not to proliferate administrative hearings needlessly. On the other hand, the general prohibitions of 805(a), involving as they do an entire spectrum of possible factual circumstances, do logically require referral to the administrative agency for ad hoc solution and application.

On page 77 of the Report of the Senate Committee Hearings on S.3500, 74th Congress, 2nd Session, the Chairman developed this subject further with Mr. Peacock:

The CHAIRMAN. I would like to have you answer specifically this question which I will ask you: Is it probable that there are some services which could be established only through a combination of coastwise and foreign activities?

Mr. PEACOCK. That is absolutely true.

Senator WHITE. What about the Matson people? What about the Dollar Line?

Mr. PEACOCK. I was going to say that is absolutely true, if you have in mind that coastwise includes not merely our coastal ports and our intercoastal service but also includes Puerto Rico, Hawaii, and perhaps one or two other small possessions. It is absolutely true, I think, as to all the trans-Pacific services such as Senator White mentioned. This present committee draft of the print of the bill is intended to take care of it by the prorating method as to those services. Now, it does not take care of it as to strictly intercoastal services which are partly coastal and partly foreign, going through the Canal and stopping perhaps at one or two foreign ports, Mexican, Central American, and South American ports. As to them, I would hesitate to say. I am not in a position to say "Yes" or "No", whether it is essential to the continuation of those services or not. (Underscoring added to indicate the particularly relevant statement)

On page 76 of the transcript of the Senate Committee hearings, Mr. Peacock, who participated in the drafting of the Act, and the Chairman of the Committee engage in a dialogue that clearly expresses their view that the section 605(a) requirement for reduction in subsidy is all the protection that is needed or intended to prevent unfair competition against the domestic operator arising from the operation of the subsidized vessels.

After Mr. Peacock stated, before the Senate Committee (p. 75 of Hearings), that ships in domestic as well as those in foreign commerce are valuable for national defense purposes, Senator Copeland, the Chairman, stated, in regard to the national defense, that with a combination of foreign and domestic trade, bigger

and faster ships might be built than would be proper for either the coastwise or foreign trade alone.

The Chairman and Mr. Peacock also agreed (p. 76 of Hearings) that the question of requiring restraints on trading areas of the subsidized ships *themselves* is no different where operating subsidy (Title VI) is concerned than where construction subsidy (Title V) is concerned. Since 805(a) does not mention Title V, clearly no restraint regarding the area of operation of ships built with construction subsidy was intended. It appears from the above analogy that *this section* was also not intended to impose restraints on the employment of ships *operated* with subsidy.

While the above excerpts provide an adequate demonstration of the fact that Congress did not intend for section 805(a) to apply to the operation of subsidized vessels, they cannot substitute for a study of the full committee reports and the pertinent portions of the transcripts of their hearings. Passages too numerous to include here, many of which are too subtle to permit a brief description, appear throughout the legislative record in support of the conclusion reached here.

Mr. John Nicolson, formerly Special Counsel of the United States Shipping Board, stated on page 151 of his book, THE MARITIME SUBSIDIES, after quoting section 805(a):

> It is not the subsidized vessels to which this provision refers, for of course *they* cannot operate in coastwise or intercoastal trade—save in the excepted cases mentioned in Sec. 605(a). The prohibition of *this* section relates to an interest in vessels other than the subsidized vessels and which other vessels it is proposed shall be operated in coastwise trade.

The intended effect of sections 506 and 605(a) was recognized and affirmed by the more recent Congress which in 1959 voted statehood for Hawaii. This is evidenced by the following portion of Senate Report No. 80 on the Hawaii-Admission to Union Bill:

Hawaii is on many trade routes to and from the Orient. Therefore, it has been a common port of call for American vessels in foreign trade. Such vessels are often granted certain federal subsidies to better enable the American merchant marine to compete with foreign fleets. One of the conditions to grants of subsidies is that such vessels will not engage in domestic trade in competition with the nonsubsidized coastwise and intercoastal carriers. The protected routes granted to nonsubsidized vessels include trade between the continental United States and any American possession or Territory. The Merchant Marine Act of 1936 made an exception to call at Hawaii while on a voyage in foreign trade, making an adjustment in subsidies to prevent improper competition. This type of shipping is an integral part of the important Hawaiian shipping industry. To change it would cause serious and unnecessary confusion. 1959 U. S. Cong. and Admin. News, 86th Cong., 1st Session, p. 1348. (Underscoring added to indicate the most relevant portion.)

Pragmatic Considerations Reflecting the Intent of Congress

The national shipping policy, expressed in section 101 of the Act, 46 U.S.C. 1101, set out on page 8, supra, has as its twin goals the enhancement of the national defense and the promotion of the foreign and domestic commerce of the United States. Ships employed in domestic and foreign trade were deemed to be equally useful in national defense,[8] therefore the statutory treatment of mixed foreign and domestic trading must be considered in relation to the effect of such activities on commerce. Having authorized, in sections 605(a) and 506, the mixed trading of the type sought by States, provided the subsidy is reduced pro-rata, can the intention logically be attributed to Congress to re-

8. See testimony of Mr. Peacock, p. 75 Hearings on S. 3500 Before Senate Committee on Commerce, 74th Congress, 2nd Session.

quire, in addition, *as a means of promoting commerce,* that section 805(a) consent for such trading be given by the Board after public hearings?

In the absence of a clear and unambiguous expression of such an intention in the Act, practical considerations weigh heavily against the view that Congress so intended. In ascertaining the Congressional intent as to mixed foreign and domestic trading it is necessary to go back to 1936 and the birth of the operating and construction subsidy program, without regard to the parochial interests of States and Matson in 1965. It was just as true in 1936 as it is today that the American merchant marine serves our commerce best when it provides frequent, regular service at reasonable rates. This service would be impaired if subsidized vessels in the trans-Pacific trades, passing within a few hours steaming of Hawaii and the island territories, were prohibited from serving the foreign commerce engendered there, as well as the off-shore domestic commerce. Obviously the calls for foreign trading would be diminished if the vessels were not permitted to load and discharge domestic cargo on these calls. Additional calls at Hawaii to serve the trade from that State to the Far East and return will promote our foreign trade. Similarly, direct sailings from San Diego to Hawaii and to the Far East and return will promote commerce in these areas.

Congress must have realized that revenues of subsidized operators would be reduced if subsidized vessels destined for the Far East and return were required to sail right by island ports where cargoes were available, without stopping. This would reduce the Government's recapture of subsidy payments under section 606 of the Act and the amount required to be laid aside for vessel replacement under section 607. An intention to bring about such a waste of public funds cannot be inferred. Restraints on free competition are imposed in only the most exceptional cases by Congress. Our national policy favors such competition. Therefore Congress did

not elect to place limits on the calls at Hawaii by subsidized vessels engaged in the Far East trades. Instead, Congress provided competitive protection for the domestic carrier by the elimination of the subsidy aid for the domestic portion of the contractor's mixed voyages.

In construing the provisions of the Shipping Act, 1916, which provides certain exemptions from antitrust laws when the Federal Maritime Commission approves cooperative working arrangements among steamship lines, the United States Court of Appeals, D. C., held that the Commission should keep before it, in considering the approval of particular arrangements, the prohibitions of the antitrust laws and see to it that conduct that, without Commission approval, would violate the antitrust laws does invade the prohibition of these laws any more than is necessary to serve the purposes of the shipping statutes. *Isbrandtsen Co. v. United States*, 211 Fed.(2nd) 51, 57 (1954). This interpretation of the Shipping Act is entirely applicable to a comparative construction of sections 605(a) and 805(a). Congress would have had in mind that limiting the calls at Hawaii would tend to give a monopoly to the exclusively domestic operator. Indeed, the erroneous interpretation of the Act in the past, requiring such permission, has had this result.

The same considerations do not apply to the operation of a separate, domestic service by the contractor or by a company related to the contractor. Congress could not anticipate the variety of situations that might occur in these activities and relationships and attempt to provide for each by specific statutory provisions. Also, such operations would have no bearing on the amount of subsidy paid, due to the absolute prohibition in section 805(a) against the diversion of subsidy funds. Congress left it to the Board to prevent such trading if, after the Board learned the facts in each instance, it found that unfair competition or prejudice to the objects and policies of the Act would result.

In attempting to apply section 805(a) to operations of subsidized vessels, Matson has created an enigma or riddle concerning the proper method of accounting to determine whether subsidy funds would indirectly be used to compete with the domestic operator. They urge that the accounting must be done by pretending that the ships in question are really not the subsidized ships at all, but ships operated on a separate service. This leads, according to their argument, to an allocation of all operating costs to the domestic leg, not merely the "incremental" or out-of-pocket costs. It requires that we close our eyes to the fact that the ships are in the vicinity of Hawaii on every foreign voyage. This strained construction of the statute is self-defeating. The contention that the operating costs must be allocated artificially, as though States were employing special vessels, separate from those in subsidized foreign trade, for the Hawaiian calls, demonstrates the weakness of the argument that section 805(a) applies when the same vessels are used in both segments of the mixed voyages. The section 605(a) requirement for reduced subsidy was adopted as an effective means of preventing the use of subsidy money in the domestic portion of the voyages of the subsidized vessels. Congress thus avoided the very enigma Matson would now create.

Congress was also aware, of course, that domestic operations are confined to United States flag vessels owned by United States citizens. Section 27, Merchant Marine Act, 1920, (46 U.S.C. 883). These American vessels are given a complete monoply as against foreign competition and they receive Federal aid such as Government insurance of ship mortgages under Title XI of the Act. Having provided these protections and benefits and the additional protections against competition through use of subsidy payment, covered by sections 605(a) and 506, it cannot be inferred or presumed that Congress intended that section 805(a) was also intended as a protection from the same subsidized opera-

tions. Even without the strong legislative record showing the absence of such an intent, it would have to be concluded that 805(a) was intended to cover *separate* operations, when considered in the light of the above factors.

Previous Board Decisions and the Contract Provisions

Predecessors of the Board required that permission be obtained under section 805(a) in circumstances such as those involved in this case. Matson argues that these decisions are somehow binding authority and that such permission is therefore required here. Conceding that the Agency rejection of the contrary position has been done "*sub silentio*", Matson cites *American President Lines—Unsubsidized Operation, Route 17*, 3 F.M.B. 457 (1951); *American President Lines—Subsidy, Route 17*, 4 F.M.B. 488 (1954); and *American President Lines—Section 805(a) Application*, 4 F.M.B. 436 (1954) as supporting the conclusion that Section 805(a) applies to the operation of subsidized ships in the mixed foreign and domestic services authorized in section 605(a). Such decisions are not binding on the Secretary, of course, and the absence of any statement of reasons in support of the conclusion prevents their being of persuasive force. The issue has never been before the courts.

States points out that in the very first instance where an operator, upon being granted a subsidy contract, was given permission to call at Hawaii with the subsidized vessels, the Maritime Commission did not mention section 805(a).[9] Domestic operators objected to the grant of permission there, but the Agency said that the section 605(a) requirement for reduction in subsidy "would seem to meet the objection." Matson shows that some rather obscure minute of a Maritime Commission meeting held later, in a connected matter, refers to section 805(a). Be that as it may, the published report of the case does not recite any need

9. *Oceanic SS Co.—Subsidy Route 27*, 3 U.S.M.C. 309 (1946).

for approval under 805(a). The San Diego briefs distinguish the above cited cases on the basis that in each of them the domestic operators did not have a monopoly in the trade involved. In the Hawaiian domestic trade, Matson carries close to 95% of all the cargo moving in the trade.

States recognizes, as it must, that a few years after the *Oceanic* case was decided the Commission began requiring section 805(a) approval in all circumstances covered by section 605(a). The question came up in connection with a case before the Agency in 1955 and it was made the subject of a rule-making proceeding. Comments were received by the Agency, which announced in 1957, without stating any reasons:

> The Board and Administrator will continue to review domestic operations of the nature described in section 605(a) so as to be able to determine, pursuant to section 805(a), whether permission should be granted for such domestic operations - - -.

The tone of this pronouncement carries the connotation that the decision resulted from the exercise of administrative discretion, rather than a legal requirement. The Board, acting for the Secretary, does have a discretion under Title VI as to the permitted trading areas, but section 805(a) with its special standards and its requirement of a hearing do not control the exercise of this discretion.

When the issue came before the Hearing Examiner in the instant case, he ruled that while he felt there was merit in States' position, section 805(a) permission was required because the Board had so stated in the order that initiated the proceeding. The order was undoubtedly issued as a routine matter in following past Agency practice. When the matter came before the Board upon exceptions to the Examiner's recommended decision the Board stated, "The Examiner found, and we agree, that the Act requires States to obtain written permission under section 805(a)

. . . ." This characterization of the Examiner's action was obviously inaccurate.

The Board discussed the problem briefly, concluding, without citing any particular passages, that the legislative history of the Act upheld their view. The only reason given that provides a clue to the Board's thinking is the statement:

> If a hearing were not provided to test intervenor's complaint of unfair competition or prejudice to the objects and policies of the Act there would be no way to judge whether any operator who intended to serve the domestic trade would compete unfairly with operators engaged exclusively in the trade.

Aside from begging the question by assuming that the tests of unfair competition and prejudice, in these circumstances, are material, this statement reveals that the Board did not consider or address itself to the real question. The quoted statement lumps together all operators "who intend to serve the domestic trade", thus betraying a failure to understand that States' thesis is based on a difference in the treatment intended for operators employing subsidized vessels, on the one hand, and separate vessels, on the other.

States does not contend that a hearing and findings is not required under 805(a) for the latter class. Over the years, the great preponderance of reported Agency cases under section 805(a) involved operators desiring to engage in the trades described in section 605(a) by employing such separate services. These cases are clearly distinguishable. The applicant listed citations to published decisions in 43 such cases in one of its briefs, while they found only eight cases involving the use of subsidized vessels in the mixed trades listed in section 605(a).[10]

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10. In his recommended decision, Examiner C. W. Robinson stated that this was the first proceeding in which a full analysis had been made of the situation where the contractor desired to engage in mixed trading with the subsidized vessels.

The erroneous interpretation placed on these statutes in years past led the Agency to place a provision in States' operating subsidy contract (Para. 1-2(f)(4)) prohibiting service between Hawaii and the mainland beyond the 13 calls "except pursuant to written permission granted under Sec. 805(a) of the Act; - - - ." Matson contends that the applicant and the Government are bound somehow to this erroneous interpretation because it is embodied in the contract. States urges that a Government agency may not by contract change a statutory plan embodied in the Act, and that if it is attempted the private contractor is not deemed to have surrendered his rights under the Act by signing the contract. *American President Lines v. United States,* 291 Fed.(2nd) 931 (1961); *Moore-McCormack Lines v. United States,* 288 Fed.(2nd) 898 (1961); *A. H. Bull SS Co. v. United States,* 108 Fed. Supp. 95 (1952).

Matson also argues, as I understand the point, that the practice of inserting such clauses in the operating subsidy contracts led Matson to permit the action to be taken without protest, when his contract was arranged, and without intervening to protect Matson's interest. It does not appear that Matson was injured by the error. In fact, it has been the beneficiary of it because it has had the protection of this restrictive clause in the contract. Such an argument could not be permitted to perpetuate the error, in any event. Part II of the two-part contract of every subsidized operator is the same, containing the "boiler plate" clauses. Clause II-15 covers the matter of engagement in coastwise and intercoastal service. It is a direct quotation of section 805(a), for the most part. This establishes that the provisions of Clause II-15 and the above quoted provision of Para. 1-2(f)(4) of the contract were not placed there as the result of the exercise of administrative discretion but rather because of a mistaken interpretation of the statute.

The Hearing Examiner determined, with complete justification of course, that he was bound by the precedent established by the maritime agencies. This precedent undoubtedly influenced the Board's decision as well. However, the Secretary is not bound by such decisions. It is unnecessary to discuss the effect of the contract terms further, because it is within the authority of the Secretary, upon the request of States, to revise the contract and this shall be done. After 57 days of hearing, during which the issue was raised, and four rounds of briefs in which this entire issue was covered at great length by both sides, Matson's claim that the question may not be considered because it was not stated in the notice of the investigation is without merit.

II. *Other Issues*

It is appropriate to consider States' contention, at this point, that even if section 805(a) were applicable to the circumstances here, the subsidy payments to States could not be considered as an element of unfair competition since Congress eliminated this element by sections 605(a) and 506 in requiring the reduction in subsidy for the period States will operate in the domestic trade. It must be concluded that since Congress did not intend section 805(a) to apply in a case like this, it could not have intended that the payment of subsidies in the foreign commerce portion of the mixed service could be deemed to be unfair competition to the exclusively domestic operator. But even assuming that the section 805(a) tests were issues to be considered here, it could not be found on this record that Matson would suffer unfair competition by reason of these additional calls by States.[11]

11. States also contends that Matson is not "operating exclusively in the coastwise or intercoastal service" and is therefore not entitled to the protection of section 805(a). Matson has a wholly owned subsidiary, Oceanic Steamship Co., that operates in the foreign commerce with Government subsidy. The two firms have the same officers, directors, and offices, file joint income tax returns, publish joint financial statements, and Matson

Matson employs 23 vessels in its freight service, providing about 13 round voyages per month between San Francisco and Hawaii and 5 separate round trips between Los Angeles and Hawaii. A tight service is run, with the result that frequently only about 5% unused space per vessel is experienced. This is an unusually high vessel utilization. Shippers sometimes have to wait 10 days or two weeks for their goods to be lifted. This is probably not an inordinate delay, but there is evidence that the tight schedule causes some shippers to "stand in line" before tendering their cargoes for transportation. The delay has not been shown to be excessive, but the trade by no means can be considered overtonnaged.

Matson's vessels are, on the average, smaller, older and slower that States'. However, they are well suited to transport the cargoes offered. Almost all are equipped to transport practically every commodity moving in the trade in containers, or vans, that are capable of being moved by truck from and to the marine terminals and loaded aboard ship without removing the cargo. One vessel is specially fitted to carry automobiles, many of which move in this trade.

Matson carries nearly 95% of the liner cargo in the trade and an even greater portion of the bulk cargo. Competition enters the trade from time to time, but with little or no success against Matson's efficiency and its entrenched position. The record does not show precisely what other carriers, either bulk and liner, are

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manages all of Oceanic's operations under a management contract between the parent and subsidiary. The Board rejected this contention for the reason that the domestic calls are made as a separate service, not with the use of the subsidized vessels. Without looking beyond the language of the statute, States' argument appears to have considerable merit, but in view of the other conclusions reached here, it is unnecessary to decide this question.

The Board's distinction between the two methods of operation is interesting. Without acknowledging the validity of the distinction as it relates to the "exclusively engaged" issue, it is readily seen that such a distinction applies, *a fortiori*, to the question of the applicability of 805(a), because of the impact of sections 605(a) and 506 on the latter question.

presently in the trade. There are apparently three or four small operators in the trade, but their carryings are so little that this has no bearing on the question of unfair competition. Whoever they are, just now, they have not complained about States' application. On July 15, 1964, Matson consented to a decree to be entered against it in an antitrust suit brought against it by the United States. The effect of the decree was to require certain Hawaiian traders who jointly owned the controlling stock in Matson to sell their shares in order to prohibit the anti-competitive practices in shipping which resulted from their control of Matson.

Matson's financial position appears to be sound and its rates adequate to produce a fair return. It placed in effect a general increase in rates averaging 9.8% in March, 1962. However, in August, 1964 it voluntarily rolled-back the rates to the original level, as this level was considered to provide adequate return on investment.[12] With this roll-back, States' rates are substantially the same as Matson's. The Federal Maritime Commission has jurisdiction to control maximum and minimum freight rates in this trade under the Intercoastal Shipping Act, 1933. This regulatory control renders groundless the fear that a subsidized carrier would enter the trade and precipitate a rate war or offer destructive rate competition. It is the intention of States to continuously follow Matson's rates.

In recent years Matson has carried nearly 1½ million tons of cargo in each direction annually as compared to about 23,000 tons carried westbound, and substantially less eastbound, by States. With the additional calls, it is estimated that States will carry a total of 67,000 tons annually.

In its argument regarding the claim of unfair competition, Matson states that applicant's proposed service will be provided

12. The increase was under investigation in F.M.C. Docket No. 960, *Hawaiian Rates—Second General Increase—1961*. The proceeding was discontinued on Matson's motion when the rates were rolled back.

with Mariner vessels built with the aid of construction subsidy, that these ships are larger and faster than Matson's, and that it would cost Matson $400,000 more per year to build such a ship, on an amortized basis over a 25 year period, than it costs States because Matson cannot obtain such subsidy. This is only one of the arguments based on States' having received construction subsidy. Even assuming the applicability of section 805(a), the effect of such construction subsidy is wholly immaterial because that section relates only to the payment of operating subsidy under Title VI and charters under Title VII. Considered in its best light, such an argument can only be taken to be so influenced by Matson's zeal to preserve its competitive advantage that it colors this intervenor's entire approach to the meaning of the Act.

Matson's contention that if it is shown that States somehow will divert subsidy funds to the domestic trade the application must be denied is equally without foundation. This is not one of the standards of approvability contained in section 805(a) or elsewhere. The anti-diversion clause contained in the last paragraph of section 805(a) does not require another finding prerequisite to approval of domestic trading. On the contrary, it is a condition that attaches only after permission is obtained, the breach of which is made a criminal offense. The protracted proof and arguments regarding such claimed diversion is therefore immaterial at this juncture.

The contention is made that if States were allowed to increase its Hawaiian calls by one per month, merely as an adjunct of its principal service to the Far East, this might make such inroads on Matson that its ability to serve this trade would be jeopardized. This amounts to speculation, at best, and the threat is incredible in view of the fact that Matson, a carrier of great ingenuity with long established connections in Hawaii, makes up to 18 round voyages in this trade per month. Such a contention cannot be accepted as proof that the one additional call by States would be

prejudicial to the objects and policies of the Act. Matson's estimates as to its reduction in net revenues are similarly unacceptable because they are based upon assumptions that are unrealistic. They assume a drop in patronage not supported by the record, and the continuation of operating costs that do not reflect any realignment of services in the event the cargoes did decrease.

The record would not support a finding that the plan of operations described by States, with the 13 additional calls at Hawaii, will result in impairment of States' ability to serve the foreign trade, as contended by Matson. The evidence also does not support the fear expressed by Hawaii that States will take a large proportion of the high-rated cargo, forcing Matson to raise its rates on lower rated commodities.

The Court of Appeals, D. C., recognized a significant difference between competition and unfair competition in *Pacific Far East Lines v. Federal Maritime Board*, 275 Fed. (2nd) 184. In circumstances at least as onerous to Matson as those involved here, the Court decided that PFEL's increased sailings would not give it an ***unfair competitive advantage***. The Court also stated that the preservation of Matson's monopoly in the Hawaiian trade "is not an object and policy of the act." The *PFEL* decision did not involve the question of the applicability of section 805(a) to the operation of subsidized vessels on routes permitted by section 605(a), because *PFEL* sought permission to operate a separate service on the route. Section 605(a) has nothing to do with that; section 805(a) has nothing to do with anything else.

In the Reply Brief filed by San Diego with the Hearing Examiner, a further distinction is pointed out:

> In discussing the effects of the P.F.E.L. case, Matson states on page 16 of their brief:
>
> 'The factual situation here is quite different from that dealt with by the P.F.E.L. case court. For P.F.E.L. received neither construction subsidy nor operating subsidy on the vessels with which it proposed to compete with Matson. Its subsidy was confined to other vessels, operated exclusively in a different trade.'

We agree that the situation is different. In the P.F.E.L. case Section 805(a) permission was clearly needed. Since the vessels to be used in the Hawaiian service were non-subsidized, there was no formula for refunding of subsidy, either construction or operating, and provisions were required to prevent the diversion of subsidy funds to the domestic operation. In this proceeding the vessels to be employed are subsidized vessels and a definite formula has been established by Congress for subsidy refund under Section 506 and 605(a) of the Act. Therefore, the use of non-subsidized vessels require Section 805(a) permission to prevent misuse of subsidy funds, while the use of subsidized vessels are subject to Section 506 and 605(a) which regulates the refunding of subsidy under the formula prescribed by Congress. Therefore, there is no unfair competition.

There are additional reasons here that were not present in the *PFEL* case for finding that the additional calls will not be prejudicial to the objects and policies of the Act. To deny this application would limit the frequency of service available to shippers in both the foreign and the domestic portions of this route. In addition it would prevent the increase of service in and out of San Diego that is needed by civilian shippers and the military establishment. It would be wasteful of shipping services, would be detrimental to commerce, and would be wasteful of subsidy funds, in the circumstances disclosed by this record, to require the States Steamship vessels to sail within a day's steaming time of Hawaii without calling there as requested.

A careful analysis of Matson's arguments based on the economics of the trade lead to the conclusion that, fundamentally, Matson's dissatisfaction stems from the proposition that the subsidy reduction formula found in sections 605(a) and 506 do not provide adequate protection for Matson, as things have turned out. The Secretary is powerless to amend this formula, of course. His duty is simply to administer the law as he finds it. The remedy

for this problem, if it is a problem, is an amendment to the statutes.

Matson expresses the fear that unless restraints are placed on calls at Hawaii by subsidized operators, under section 805(a), the trade will be overtonnaged and Matson's ability to continue in the trade will be threatened, since these operators will call at Hawaii at will. This overlooks the fact that under Title VI the Agency has the authority and the responsibility to control the number and frequency of sailings of subsidized operators and under section 211 of the Act to establish the services and routes that qualify for subsidized operations as being essential to our commerce. Thus, for example, in establishing Trade Route 29, which is involved here, the Agency determined:

> The Hawaii/Far East trade should be served in conjunction with a limited number of U. S. flag sailings on this and other essential routes and services.[13]

The Board can and it will exercise this authority so as to guard against overtonnaging this mixed foreign and domestic service by subsidized operations and so as to prevent intermittent calls or calls "at will". Hawaii should and it will be treated entirely separately from the two ranges of ports on the Pacific Coast in determining the permitted trading areas under the Act. The means are at hand in the Act, apart from section 805(a), to assure the regularity of service that is essential to shippers and the expansion of commerce without undue impact on established operators. These discretionary powers will be exercised as part of the Secretary's contracting authority under the Act and the delegation of authority to the Board.

For the foregoing reasons it cannot be concluded that the increased calls would result in unfair competition or be prejudicial to the objects and policies of the Act.

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13. *Essential United States Foreign Trade Routes*, published by U. S. Department of Commerce, Maritime Administration, July 1960, page 62.

There was no prejudicial irregularity in the Board's opinion being published after its Chairman resigned, as contended by Matson. The decision itself was arrived at while he was still in office.

Matson requests that in the event States is permitted to increase its calls at Hawaii, the effective date of this decision be postponed 60 days and, in the event judicial review is sought, thereafter until the final disposition of such litigation. The effective date of this decision will be postponed 60 days in order to afford Matson time to seek judicial relief, but the decision shall become effective at the end of that period unless a stay should be ordered by a court.

Matson's argument as to restrictions that should be imposed, if permission under section 805(a) is granted States to make the additional calls, must fail in the light of this decision regarding the scope and meaning of section 805(a). In addition, the argument is a repetition of points raised elsewhere by Matson and covered elsewhere in this decision.

Contentions and proposed findings and conclusions not specifically discussed herein have been considered and those not adopted have been found not to be supported by reliable and probative evidence or to be irrelevant.

Ultimate Conclusion

Under sections 605(a) and 506 of the Merchant Marine Act, 1936, subsidized vessels may engage in voyages in the foreign trade with intermediate stops at the State of Hawaii, pursuant to contracts with the United States which limit the number of such voyages and the calls in various segments thereof under the authority of other provisions of Title VI and section 211 of the Act. No additional Government permission for such voyages of the subsidized vessels or services is required under Section 805(a) of the Act, as that section applies solely to the operation in domes-

tic commerce of vessels other than those whose operation is subsidized.

This proceeding is hereby remanded to the Maritime Subsidy Board which shall enter an order forthwith in accordance with this decision and shall discontinue the proceeding. The Board shall also revise the States Steamship Company subsidy contracts in accordance herewith, eliminating any limits on the trading areas that are based on section 805(a) of the Act. However, the effective date of the said order and the revision of the contracts shall be postponed for 60 days.

E. ROBERT SEAVER
E. Robert Seaver
Review Examiner

Washington, D. C.
March 1, 1965

Appendix B

Department of Commerce
Maritime Administration
Maritime Subsidy Board

Docket No. S-121

STATES STEAMSHIP COMPANY—APPLICATION TO CALL AT HAWAII

Submitted: September 27, 1963 Decided: October 7, 1963

Served November 27, 1963—Maritime Administration
Maritime Subsidy Board

In the matter of the application of States Steamship Company, a subsidized carrier, for permission under Section 805(a) of the Merchant Marine Act of 1936, as amended, to have vessels in its "B" and "C" services call at Hawaii on not to exceed 26 outbound and 26 inbound sailings annually, for the transportation of cargo between California and Hawaii.

James L. Adams and *Gordon L. Poole,* for applicant.

George D. Rives, John E. Sparks, and *Alvin J. Rockwell* for Matson Navigation Company; *Shiro Kashiwa, Bert T. Kobayashi,* and *Richard Sasaki* for State of Hawaii; *William R. Daly* for San Diego Unified Port District; and *Odell Kominers* for Pacific Far East Line, Inc., intervenors.

Louis Zimmet, David Schmeltzer, and *John Day* as Public Counsel.

FINAL OPINION AND ORDER OF THE BOARD
Donald W. Alexander, Chairman, and J. W. Gulick and
Robert J. Ables, Members

Found That:

1. States Steamship Company's proposed service to have vessels operating in its "B" and "C" services[1] on Trade

1. "B" service: Washington-Oregon-California/Far East; "C" service: California/Far East.

Route 29 (U.S. Pacific/Far East) call at Hawaii on not to exceed 26 outbound and 26 inbound sailings annually for the transportation of cargo between California and Hawaii will not result in unfair competition to any domestic operator within the meaning of Section 805(a) of the Merchant Marine Act, 1936, as amended.

2. States Steamship Company's proposed service to have vessels operating in its "B" and "C" services on Trade Route 29 (U.S. Pacific/Far East) call at Hawaii on not to exceed 26 outbound and 26 inbound sailings annually for the transportation of cargo between California and Hawaii would not be prejudicial to the objects and policy of said Act.
3. A subsidized operator is not excused by Sections 506 and 605(a) of the Merchant Marine Act, 1936, as amended, from obtaining the written permission of the Board under Section 805(a) of the Act to operate vessels in a domestic service for which Sections 506 and 605(a) require the pro rata pay back of construction subsidy and the pro rata abatement of operating subsidy.
4. Matson Navigation Company is operating exclusively in the coastwise or intercoastal service within the meaning of Section 805(a) of the Merchant Marine Act, 1936, as amended.

Docket S-121
DECISION AND ORDER

States Steamship Company (States) operates a subsidized service on Trade Route No. 29 (U.S. Pacific ports/Far East). In connection with its vessels in its "C" service, States has written permission under Section 805(a) of the Merchant Marine Act, 1936, as amended (Act) to make 13 annual calls to Hawaii, outbound and inbound for transportation of cargo between Cali-

fornia and Hawaii. This proceeding arises from States' letter-application of January 30, 1961 for permission under Section 805(a) to utilize subsidized Trade Route 29 "B" and "C" service vessels (not in excess of 26 annual outbound and inbound sailings) in the California/Hawaii domestic trade.

A hearing was held, briefs and reply briefs were duly filed and on March 11, 1963, Examiner C. W. Robinson issued his Recommended Decision. He found and concluded that granting States' application to increase, to a limit of 26, the number of annual California/Hawaii sailings would result in unfair competition to Matson Navigation Company (Matson), an intervenor in the proceedings, and would be prejudicial to the objects and policy of the Act, except as follows:

> (1) States Steamship Company should be permitted to serve San Diego, California 26 times a year in each direction; and
>
> (2) States Steamship Company should be permitted to lift cargo in California for discharge in Hawaii, but not cargo in Hawaii for discharge in California, to the extent of 26 calls a year, whenever Matson Navigation Company, upon two weeks' prior request therefor informs the shipper, within 24 hours after such request, that it is unable, for whatever reason, to transport cargo offered to it for specific sailings.

Exceptions to the Examiner's findings and conclusions and replies thereto were duly filed. The Board heard oral argument on September 27, 1963.

At the oral argument, States, for the first time in these proceedings, moved to expunge certain arguments said by States to appear unexpectedly in Matson's *Reply Brief to Exceptions* to the Examiner's decision. (pp. 64-73). States claims it had relied on Matson's assurances in its *Brief On Exceptions* to the Examiner's decision, that Matson rested on arguments previously made and

that the additional argument surprised States and Matson, thereby, violated the rules of the Board and fair play by denying States an opportunity to reply to this additional argument.

It is difficult to believe that States has made a serious motion to the Board. The worst adjective it ascribes to Matson's alleged offensive material is that it is an "additional" argument. The Board objects too, to the seemingly endless additional arguments frequently made in proceedings before it but, standing alone, States' argument scarcely supports a motion to expunge. Further, States claims that Matson has violated the Board's rules of practice but fails to cite any provision which has been violated. We refuse to review all our rules of practice and speculate as to which one States believes has been violated.

In any event, Rule 5(o) of the Agency's Rules of Practice and Procedure, effective July 31, 1953, provides that *all motions* and requests for rulings by the Board *shall be in writing* and conform to the requirements of Rule 8. Rule 8 provides that written motions shall show that service has been made upon all parties to the proceeding. On these technical rules of practice alone, the motion is defective. Motion denied.

The Board has considered the Examiner's Recommended Decision, the briefs and exceptions and the entire record in this proceeding and finding merit in various exceptions, hereby rejects the Examiner's recommendations and adopts his findings and conclusions, with noted additions and modifications, only to the extent that they are consistent with the Board's decision.

DISCUSSION:

Four principal issues are involved in this proceeding:

1. The applicability of Section 805(a);
2. Whether Matson is exclusively a domestic operator;
3. The question of unfair competition;
4. Whether it would be prejudicial to the objects and policy of the Act to grant States' application.

1. *Applicability of Section 805(a)*[2]

The Examiner found, and we agree, that the Act requires States to obtain written permission under Section 805(a) for its vessels to call at Hawaii.

The issue concerning the applicability of Section 805(a) is whether written permission from the Subsidy Board is required before States may increase its sailings, as proposed, between California and Hawaii, in view of the fact that subsidy must be repaid by the applicant, or is abated, in accordance with the provisions of Section 506 and 605(a)[3] whenever it engages in the domestic segment of a mixed foreign and domestic voyage.

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2. Sec. 805(a). It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act . . .

3. Sec. 506. Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, . . . or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, . . . and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Commission that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year.

Sec. 605(a). No operating-differential subsidy shall be paid for the operation of any vessel on a voyage on which it engages in coastwise or intercoastal trade: Provided, however, that such subsidy may be paid on a . . . voyage in foreign trade on which the vessel may stop at the State of Hawaii, . . . and if the subsidized vessel earns any gross revenue on the carriage of mail, passengers, or cargo by reason of such coastal or intercoastal trade the subsidy payment for the entire voyage shall be reduced by an amount which bears the same ratio to the subsidy otherwise payable as such gross revenue bears to the gross revenue derived from the entire voyage.

States maintains that such written permission is not required by the Act. The applicant argues that Section 605(a) permits payment of subsidy on a voyage in mixed foreign and domestic trade with stops at Hawaii, provided the subsidy is pro rated. States argues that Section 805(a) is applicable only to unsubsidized vessels of an operator receiving operating-differential subsidy when they engage in domestic intercoastal or coastwise service. In its view, Sections 506 and 605(a) impose the exclusive statutory requirements applicable to States' proposed service and, therefore, it does not require Section 805(a) written permission to make the proposed intermediate stops at Hawaii. The applicant introduced a comprehensive review of the legislative history of Section 805(a) in support of its position.

The Matson Navigation Company, to the contrary, maintains that States Steamship Company is required to get Section 805(a) written permission to make calls at Hawaii because the controlling factor is the service performed and not the vessel used. Matson contends that Sections 506 and 605(a) do not relieve States from the necessity of obtaining written permission under Section 805(a), because those sections deal with the separate and distinct requirements of returning to the Government that portion of operating-differential subsidy which is provided when operating in competition with foreign-flag vessels and do not in any way condition the applicability of Section 805(a), which provides protection for carriers engaged exclusively in the domestic trade. Most importantly, Matson argues that since its adoption by Congress and, without exception, Section 805(a) has been construed to require written permission of the Subsidy Board and its predecessors and that is the Board's contemporaneous construction.

Public Counsel also argues that written permission is required under Section 805(a). They point out that the rules of statutory construction require that meaning be given to each provision of

legislation and that Sections 506 and 605(a) protect the Government, while Section 805(a) is designed to protect domestic operators against unfair competition which might result from a subsidized operator. Finally, Public Counsel maintain that a specific rule-making action (in Docket No. S-59, 1957) disposed of the issue by an order determining that written permission was required under Section 805(a), where operations were proposed under the authority of Section 605(a).

After careful consideration of the arguments presented by the parties, including the comprehensive discussion of the legislative history of Section 805(a) which was introduced by the applicant, we believe that the applicant, in this proceeding, must have written permission from the Board to provide the proposed service.

Although the question is not without doubt, (for the reasons indicated in the applicant's review of the legislative history of this Section) we believe Congress intended controls for the protection of domestic operators in addition to the subsidy repayment and abatement provisions of Sections 506 and 605(a). These controls are intended to be exercised under the authority of Section 805(a), which authorizes the Board, after hearing, to find whether the proposed service will result in unfair competition to carriers operating exclusively in the coastwise or intercoastal service and to determine if the proposed service would be prejudicial to the objects and policy of the Act. If a hearing were not provided to test intervenor's complaint of unfair competition or prejudice to the objects and policy of the Act there would be no way to judge whether any operator who intended to serve the domestic trade would compete unfairly with operators engaged exclusively in such trade. We consider that the questions of unfair competition or prejudice are separate and apart from the questions of repayment or abatement of subsidy when an operator proposes to compete in the domestic trade. Section 805(a) is concerned with unfair competition and prejudice. Sec-

tions 506 and 605(a) are concerned with the repayment or abatement of subsidy for that part of a voyage which does not compete with foreign-flag vessels, but competes with unsubsidized domestic operators. We believe that the rules of statutory construction, require that full meaning be given to each provision of legislation and that the subject for which Section 805(a) was designed is sufficiently different from the subject under Sections 506 and 605(a) as to require separate determination.

We believe that Section 805(a) is a necessary adjunct to Sections 506 and 605(a) in preserving fair competition. It is part of the overall administrative machinery geared to preventing unfair competition in the domestic trade and is applicable to mixed Section 506 and 605(a) voyages. Therefore, we agree with the Examiner that written permission under Section 805(a) is required in this case before States may legally commence the proposed service to Hawaii.

2. *Whether Matson is Exclusively a Domestic Operator*

Section 805(a) states that the Board shall not grant an application if it finds that the proposed service will result in unfair competition to any person, firm or corporation "operating exclusively" in the coastwise or intercoastal service or if it would be prejudicial to the objects and policy of the Act. To be entitled to the protection afforded by this section, therefore, it must be found that the carrier seeking such protection is operating exclusively in the coastwise or intercoastal service.

States Steamship Company contends that Matson is not such an exclusive domestic operator because it operates three services from the Pacific, Gulf and Atlantic coasts with vessels which are frequently interchanged or integrated in other routes. States maintains, further, that Oceanic Steamship Company, a wholly owned subsidiary of Matson operates voyages of mixed domestic and foreign trade in the Far East and that the President of Matson is also the President of Oceanic; that Matson manages Oceanic including joint publication of tariffs, division of fares and com-

mon use of freight solicitors. In addition, States shows that Matson and Oceanic filed consolidated financial statements and tax returns and that Oceanic is identified with Matson's advertising. Further, according to States, Oceanic engaged in domestic California-Hawaii trade in the course of its subsidized Trade Route 27 operations up through April of 1962, indicating that Matson, through its subsidiary organization, Oceanic, was engaged in subsidized, as well as, unsubsidized operations.

Moreover, States maintains that Section 805(a) is designed to protect operators who furnish domestic services (which do not include foreign ports); however, from 1958 to February 1961 vessels operated by Matson in the California-Hawaii service called at British Columbia. Although these calls to British Columbia terminated in February 1961, these voyages were made prior to States' filing for increased sailings under Section 805(a) and should be considered in determining whether Matson has an "exclusive domestic" status. States concludes that the status of exclusive domestic operators cannot be applied to each separate and distinct service and that on the basis of integrated operation with Oceanic in our foreign commerce and by reason of Matson having served foreign ports, that Matson is not, in fact, an "exclusive domestic operator."

Matson, to the contrary, concludes that for the purposes of a Section 805(a) proceeding, it is an "exclusive domestic operator" in its California-Hawaii trade and that its connection with Oceanic does not change this status. The question was laid to rest, Matson concludes, in the *PFEL*[4] case, where Matson was held to be an "exclusive domestic operator" despite such connection with Oceanic.

We think Matson operates an exclusive domestic service between California and Hawaii within the meaning of Section 805(a) of the Act and that it is entitled to the hearing-procedure

4. Pacific Far East Line Inc.,—Sec. 805(a) calls at Hawaii, 5 F.M.B.—M.A. 287, 297 (1957).

protection provided by the section. States' arguments to the contrary were considered by the Board in States' application under Section 805(a) for one additional call to Hawaii, Docket S-128 (1961) wherein the Board concluded that Matson is a corporation operating exclusively in the coastwise or intercoastal service and that its California-Hawaii service is exclusive within the meaning of Section 805(a). Also, on appeal from the decision of the Federal Maritime Board in the *PFEL* case, 275 F. 2d 184, the Court did not take issue with the Board's finding that Matson had standing as an "exclusive domestic operator" entitled to the protection provided in Section 805(a). Accordingly, for the purposes of this proceeding, we conclude that Matson is an "exclusive domestic operator" entitled to the protection afforded by the section with respect to the need to hold a hearing to determine if applicant's proposed service would constitute unfair competition or would be prejudicial to the objects and policy of the Act.

3. *Unfair Competition*

States and Matson are sharply divided on the question whether an increase of sailings by States from 13 to 26, annually, would constitute unfair competition, as contemplated in Section 805(a) of the Act. States, supported by San Diego, concludes that such increased sailings do not constitute unfair competition. Matson, Hawaii and Public Counsel conclude to the contrary. The Hearing Examiner found and concluded (save as noted in his ultimate findings respecting service from San Diego) that the granting of the application would result in unfair competition to Matson, within the meaning of Section 805(a) of the Act.

In our opinion, those who conclude that the proposed increased sailings would constitute unfair competition do so on the theory that operators engaged exclusively in the domestic trade are "fundamentally entitled" to carry the trade and, as a matter of law, must be shielded from competition by subsidized operators. We do not agree, as discussed below, that this doc-

trine applies in this case and we conclude that it would not constitute unfair competition to grant this application.

The heart of States' position is that the proposed increased sailings would not constitute unfair competition, as a matter of law, because Congress has authorized subsidized operators to engage in the domestic trade on condition that they repay a certain portion of the construction-differential subsidy and that they abate operating-differential subsidy when they engage in such trade; and, further, that the Board has no more power to say that Congress did not extract enough than it does to say that the domestic trade reduction is excessive. States contends that Matson is hardly in a position to claim unfair competition. It argues, that by its monopoly, Matson has blanketed the attempts of all operators to compete; that Matson's shipping monopoly is impenetrable because of a vast corporate interlocking with hundreds of companies which wield enormous economic power throughout the Hawaiian Islands, enabling Matson to carry 92 per cent of the cargo westbound and 98 per cent of the volume eastbound, for a total of 95 per cent of the trade.

Matson contends, to the contrary, that the measure of unfair competition is determined best, not by the continuing ability of the unsubsidized operator to compete for available traffic, but by the advantages which remain with the subsidized operator even after repayment and abatement of subsidy under Sections 506 and 605(a) of the Act. In particular, Matson concludes that unfair competition would result if States is permitted to increase sailings, as proposed, because the subsidy which States has already received has permitted it to build and operate new Mariner-type ships which Matson cannot afford because each one of the vessels costs about $12 million, whereas, Matson's aggregate worth in vessels now amounts to about $15 million total. Even on this amount of investment, the rate of return is inadequate. Refund

of subsidy, Matson maintains, does not offset the financial economic advantages derived from deferred tax benefits, use of capital reserve funds and the purchase of vessels with deferred funds. In effect, Matson contends that the subsidy money which States would pay back to the government for that portion of its mixed voyage engaged in the domestic trade would amount to interest free loans.

Further, Matson argues that the grant of permission to increase sailings would constitute unfair competition because the basic expenses of the mixed foreign and domestic voyages will be borne by subsidy, rather than by capital expenditures by the operator, as is the case with Matson. This is indicated by States' use of the incremental accounting formula for its existing California-Hawaii voyages from 1959 through 1961 which showed that States' average profit was $14,000. Matson argues that if a full cost absorption accounting formula were used, financial reports on existing services would have disclosed a loss. It concludes that the Act contemplates a full absorption accounting system with a separation between the domestic and foreign legs of the mixed voyage. This would enable a comparison to be made between subsidized and unsubsidized operators and the costs to each for providing service on the domestic leg.

The question of the meaning and intent of the term "unfair competition" in Section 805(a) has arisen with greater frequency and has become more intensely debated in recent years than previously. This is true, perhaps because trade is increasing with Hawaii, Alaska and Puerto Rico, in particular, and offshore possessions in general. Hawaii and Puerto Rico are in direct line with foreign ports served by our subsidized carriers and it is understandable that with a growing economy, in these and other areas, subsidized carriers would wish to serve this trade en route to foreign ports. It is perhaps timely, then, to examine in some depth the intent of Congress in requiring the Board to make

findings with respect to unfair competition and with respect to whether mixed voyages by our subsidized carriers would be prejudicial to the objects and policy of the Act.[5]

Section 805(a) is addressed to the proposed operation of "any contractor" or any holding company, subsidiary, affiliate or associate of such contractor or charterer or any officer, director, agent or executive thereof who intends to operate vessels in the domestic intercoastal or coastwise trade. So extensive a listing of operators required to obtain permission from the Board before they may operate in the domestic trade, makes apparent the broad scope of the Board's authority in these proceedings. Further, although the words "public interest and convenience" appear in the proviso in Section 805(a), a complete reading of the section indicates that the Board has the obligation to weigh questions of unfair competition and prejudice to the objects and policy of the Act in the light of what it considers to be in the public interest and convenience. Unlike other provisions of the Act (such as Section 605(c)), the Congress has authorized the Board to view the entire competitive relationships involved and determine, in its unrestricted judgment, how the public interest will be served best.

Clearly, then, the Congress intended for the Board to have wide discretion to determine what was in the public interest with respect to service in the coastwise or intercoastal trade when the Board was asked to judge (after intervention from persons operating exclusively in such trade) whether the proposed service would amount to unfair competition or would be prejudicial to the objects and policy of the Act.

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5. The discussion of unfair competition in this case very closely parallels the discussion of the same subject in Maritime Subsidy Board Dockets Numbers 140 and 141 which involved very similar issues and were considered at the same time as this case.

In fulfilling its responsibility to make these determinations within the broad discretion given to it by the Congress, the Board is mindful of the effect of sections 506 and 605(a) which to a degree—an important degree—abate the privileges and advantages provided to our subsidized operators in order for them to compete with foreign-flag carriers. We consider, then, that any finding the Board would make with respect to unfair competition would need to be based on evidence that the resulting advantage of the subsidized operator over the operator engaged exclusively in the coastwise or intercoastal service is such an overwhelming, unconscionable advantage as to constitute "unfair competition." Such determination must be based on the facts and circumstances involved and not on any issue of law since Congress has provided a formula to repay construction-differential subsidy and abate operating-differential subsidy as a condition of subsidized operators engaging in the domestic trade.

The Circuit Court of Appeals in the *PFEL* case 275 F. 2d at 186, construed the unfair competition clause in Section 805(a) as requiring a showing of (1) fraudulent competition (2) cut-throat competition or (3) competition in any way unfair according to accepted legal or ethical standards. It is true that the Court's construction of the term unfair competition in that case was applied to a factual situation materially different than exists in this case. But, it is not true that the Court's construction of this phrase does not apply in this case because, in our opinion, the Court was applying a standard that could be used in any of the cases under Section 805(a) where the Congress has given to the Board the discretion to decide in the public interest what is fair competition and what is not fair competition. Accordingly, we adopt the Court's view in the *PFEL* case, not as a view which we feel we must follow, but as a view which we think we should follow.

Even in the absence of the *PFEL* doctrine on unfair competition, we do not believe there is unfair competition, in fact, in States' proposed operation because the abatement of subsidy, together with the statutory and contractual restrictions imposed upon companies operating pursuant to subsidy contracts, tend to equalize the advantages over unsubsidized operators, which accrue from such contracts. Also tending to equalize such advantages, is the fact that domestic intercoastal and coastal operators, such as the intervenor herein, are and have been recipients of government aid in various forms and in substantial measure such as the trade-in and build vessel exchange and cargo preference programs.[6]

Also debated in this proceeding, was the question whether the so-called "fundamentally entitled" doctrine was relied on by the intervenor and, if so, whether the Court in the *PFEL* case repudiated this doctrine. Applicant says that the intervenor relies on this doctrine and that the doctrine has been repudiated. The intervenor says that it does not rely on the doctrine but relies instead on the plain intent of Congress to provide protection to operators exclusively engaged in the domestic trade and that where a subsidized operator entering the domestic trade would have any competitive advantage over the domestic operators this would result in unfair competition. Otherwise, the intervenor says, the protection intended to be provided in Section 805(a) would be a fiction.

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6. The fact that States' service to Hawaii can pay for itself on an incremental cost basis only is a strong argument for finding that the service would constitute unfair competition, as contended by Matson, but it is emphasized that this is only one factor to be weighed in the balance and is not controlling as a matter of law. There is no law, of which we are aware, requiring that proposed service shall be approved only if it satisfies a full cost absorption theory. If there were such a requirement then States' existing service of 13 sailings, annually, in the California-Hawaii trade would be illegal, since the service does not now satisfy full cost absorption requirements. No such finding of illegality has been made—and so far as we have been able to determine, neither Matson nor anyone else contended to this effect when Pacific Transport Lines, Inc. States' predecessor, was authorized to make these 13 sailings.

If there is any question left on the point, we do not believe that operators exclusively engaged in the domestic intercoastal and coastal service are "fundamentally entitled" to protection from subsidized operators. There would be no need for a proceeding under Section 805(a) to determine whether the amount of competition proposed by subsidized operators is unfair if the domestic operators were entitled to such a degree of protection. Also, we do not agree with intervenor, Matson, that such benefits as subsidized operators receive from the government, not accruing to domestic operators, create a *prima facie* case of unfair competition. We do believe, however, that Congress intended to provide substantial protection for such domestic operators and in cases where the advantages of the subsidized operators are so great as to make it unlikely that the domestic operators would be able to compete effectively, then a finding of unfair competition with respect to the proposed service should be found.

The amount of protection required in relation to the remaining advantage of the subsidized operator is, in our opinion, a matter of judgment to be exercised by the Board, depending on all the circumstances.

In view of the predominant, almost monopolistic, competitive position Matson enjoys in the California-Hawaii trade, we do not find a need for such a degree of protection and we do not find that States would have such a degree of advantage over Matson as would make it likely that Matson could not continue to compete effectively for available cargo.

Accordingly, based on all the facts and circumstances of this case, we find that the proposed increase of 13 sailings would not constitute unfair competition to Matson, within the meaning of Section 805(a) of the Act.

4. *Whether it would be Prejudicial to the Objects and Policy of the Act to Grant States' application*

In Dockets Numbers S-140 and S-141 (Grace Line Inc., American Export Line, Inc. U.S. Atlantic-Puerto Rico Service) decided by the Maritime Subsidy Board on October 18, 1963, but considered by the Board at the same time as the case now pending, it was held that:

> "the Congress intended for the Board to have wide discretion to determine what was in the public interest with respect to service in the coastwise or intercoastal trade when the Board was asked to judge (after intervention from persons operating exclusively in such trade) whether the proposed service would amount to unfair competition or would be prejudicial to the objects and policy of the Act."

Further, it was held with respect to the Grace application that, although the proposed freight ship service would not amount to unfair competition, it would be prejudicial to the objects and policy of the Act, indicating thereby that the Board considered these two provisions of Section 805(a) to be disparate requiring separate and independent judgment. Although the Board felt it would be necessary to show that the service proposed by a subsidized operator would result in an overwhelming, unconscionable advantage over the unsubsidized operator as to constitute "unfair competition," it decided that the amount of protection required for the unsubsidized operator in relation to the remaining advantages of the subsidized operator was a matter of judgment to be exercised by the Board depending on all the circumstances.

The Board decided in Docket No. S-140 that the service proposed by Grace would be prejudicial to the objects and policy of the Act because of the grossly disproportionate distribution of domestic to foreign trade that would result if Grace's application had been granted. The Board found this could not be justified under Congressional mandates to subsidize our merchant fleet to compete more effectively with foreign-flag vessels. The Board also found that existing and potentially required service was adequate (noting that 7 different steamship companies were pro-

viding the required service and that Grace's entry into the trade might cause such overtonnaging as would result in the failure of some of the existing non-subsidized carriers to stay in business) and concluded that there was no *need* for Grace's proposed service in the trade between U.S. Atlantic ports and Puerto Rico.

The findings in the *Grace* case are noted because the question may properly be raised why the Board concluded in that case that it would be prejudicial to the objects and policy of the Act to permit the proposed service and why it concludes in this case (which involves many of the same questions as the *Grace* case) that the proposed service by States Steamship Company would not be so prejudicial.

As we have indicated, we feel that the amount of protection required by an unsubsidized operator engaged exclusively in the domestic trade must be judged in the light of all of the surrounding circumstances and the justification for the proposed service can (and in this case it does) vary depending on the circumstances.

Eighty per cent of Hawaii's population inhabits Oahu. Seventy per cent of all cargo is handled at Honolulu. Trans-shipments to neighbor islands are accomplished by barges. Ninety-nine per cent of the cargo in 1960, moving in and out of Hawaii, moved between Hawaii and the mainland. One per cent of the cargo moved to the Far East, mostly to Japan. In the last decade, the population increased 26 per cent and it is expected to continue to increase, with an expanding economy of 5 to 10 per cent, annually, stimulated by recent statehood.

Over the last decade, and more, Matson consistently has carried about 98 per cent of the cargo between Hawaii and the Pacific Coast. It carries about 92 per cent of all berth liner cargo. In 1961 it carried approximately 1.5 million tons of cargo, 80 per cent of which was discharged at Honolulu. Eastbound Matson lifted approximately 1.3 million tons of cargo at Honolulu, over

90 per cent of which was discharged in the San Francisco area. Matson carries most of the pineapple crop. In 1960 it carried in their entirety all of Hawaii's sugar and molasses products eastbound to California. In the near future, Matson plans to have a lift capacity of about 2½ million measursement tons, annually, and the company contemplates about 92 per cent utilization of its vessels.

Matson has engaged in the Hawaii trade for about 80 years. It has invested large sums in shore facilities and equipment to handle huge amounts of cargo under its extensive containerization program. Through intimate and complex business relationships, Matson is closely associated with major producers and shippers of freight and through these same affiliations has terminal and stevedoring services performed for them both in Hawaii and on the mainland.

Pacific Transport Lines, Inc., States' predecessor, began to make calls at Hawaii in 1950. When Pacific Transport Lines became subsidized in January 1953, it received Section 805(a) permission to continue making 13 calls at Hawaii, in each direction.[7] States acquired the Company in 1954 and merged with it in 1957. Initial permission to States to serve the California-Hawaii trade was limited to C-3 vessels. Later this permission was extended to Mariners.

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7. In *May 1952,* Pacific Transport Lines, Inc. applied under Section 805(a) to have permission to continue its service to the Hawaiian Islands while receiving subsidy to operate on Trade Route 29. (An operating-differential subsidy agreement for service on Trade Route 29 was executed December 1952). In addition, in the same proceeding, permission was requested to permit the Company's largest stockholder to continue to own stock in Matson Navigation Company. A public hearing was held in which Matson and Pacific Far East Line, Inc. intervened but did not oppose continuation of Pacific Transport Lines, Inc.'s continued Hawaiian service. The Examiner found on the 805(a) issues that continuation of the Hawaiian service was granted, until further order of the Board. He concluded that under the existing conditions, granting of permission would not result in unfair competition and would not be prejudicial to the objects and policy of the Act. (4 F.M.B. 146).

Since 1950 the annual maximum westbound cargo carried by applicant has not exceeded 23,000 short tons. Eastbound carryings have been substantially less. In each direction, States calls only at Honolulu. Cargo from the neighbor islands is handled by a local cargo tug and barge service, which will not be changed if the application is granted.

The record discloses a steadily increasing and expanding economy in Hawaii and the amount of cargo in the California-Hawaii trade is anticipated to increase from 5 per cent-10 per cent annually. There is persuasive evidence showing that Matson, running almost continuously over 90 per cent capacity has frequently shut out cargo and required shippers to wait as much as 10 days or more to have their cargo lifted.

Accordingly, we do not feel that States' additional sailings will over-tonnage the trade but instead will help remedy some of the tightness of Matson's closely run service.

We are not persuaded by Matson's contention that States will engage only in "cream skimming" shipping practices. Even if this were the case we do not believe that the amount of additional sailings by States will have such competitive effect on Matson as to lessen substantially the ability of Matson to compete for available cargo.

As noted, Matson has a tremendous advantage in obtaining cargo and controlling much of that which is shipped eastbound, to the exclusion of competitors. States does not solicit cargo eastbound and it only carries, westbound, that amount of cargo which Matson is not able to accommodate, since there is evidence in this record to show a scarcity of space aboard Matson ships going westbound. This is apparent from the unusually high utilization of Matson's capacity and complaints indicating that Matson's services do not fully meet the needs of many shippers.

There is little reason to believe, as Matson contends, that States will survive in the domestic portion of its mixed voyage

only by charging sub-standard rates. States has specifically said that it will follow Matson's rates which are and should be the prevailing rates because Matson is the unquestioned predominant carrier in the trade. Without the necessity of seeking permission, Matson has the flexibility to control its fleet, unlike States, to meet changing circumstances. These factors are important in judging the question of the extent to which Matson's trade needs to be protected against competition from a subsidized carrier within the overall public interest considerations of Section 805(a).

In weighing all the evidence in the case, the one pervading factor is the size of Matson's operations in the California-Hawaii trade in relation to the service proposed by States. By increasing the number of sailings from 13 to 26 annually, as proposed, it is expected that the total diversion of cargo from Matson would not exceed 67,000 tons. Without further growth in the Hawaiian economy, that amount of diversion would not equal 5 per cent of Matson's westbound tonnage and only slightly more than that eastbound. If the Hawaiian economy expands only to the extent conservatively estimated, that amount of diversion would not equal the resulting annual increase in cargo. For each sailing by States every two weeks, Matson will have approximately 14 sailings each month. Based on cargo lifted in 1961 (but not including the tonnage that would be diverted if the application is granted), Matson during the course of a year would carry 22 times as much cargo as States and would do so on only 5 times the number of sailings.

Keeping in mind that Section 805(a) requires the Board to make an *affirmative* finding that the proposed service would be prejudicial to the objects and policy of the Act before it can deny permission to a subsidized operator to engage in the domestic trade, we find it difficult to conclude that Matson requires such protection as to deny States permission to increase sailings where

the amount of cargo that would be moved by States under the increased sailings plan would be 5 per cent of the total cargo moving in the California-Hawaii trade as compared to 95 per cent carried by Matson.

Another important factor in weighing the total public interest considerations here is shipper interest.

Understandably, Matson relies heavily on the views of a number of shipping associations (that the service provided by Matson between Hawaii and the mainland is adequate) as reason why States' application should be denied. In this connection, Matson points to the opposition of the State of Hawaii to the proposed increased sailings by States.

The State of Hawaii is opposed to States' proposed additional calls because of "the possible increase in the level of rates in the Hawaiian trade as a result of the 13 additional calls." Hawaii's position is based on what it considers the long term effect on the economy of the State, and not the short term benefits that may be derived from competition. Despite the fact that freight rates already "are very high" according to Hawaii, such rates can rise even higher if the proposed competition is permitted because "it is quite likely that Matson's profit position would deteriorate" due to the competition, which would have the effect of loss of tonnage, lower capacity utilization, increased unit costs and ultimately a need for higher rates to compensate for loss of business. Eschewing competition as a factor in maintaining rate levels, the State of Hawaii concludes that protection from "the evils that we find under the monopoly situation that Matson enjoys," is provided by the fact that Matson is a regulated company (by the Federal Maritime Commission).

It is perhaps an understatement to say that Hawaii's position is unique in proceedings of this kind. Typically, in such proceedings, public representatives argue for more service, to be provided by as many competitors as possible, as a means not only to in-

crease service but as a check valve on rates should one carrier gain unusual strength in the trade. Usually, in such proceedings, the Subsidy Board, in common with regulatory commissions faced with the same question, discounts to a degree the exhortations of such public representatives for more and more service for the same reason that Hawaii argues in this case that we should deny States' application, viz., that in the long run effective competition may be dissipated if there is not enough cargo for all the existing carriers to remain in business.[8]

Whatever merit there may be to Hawaii's long-range public interest view favoring regulation to competition as a means of controlling rates, the theory does not apply in this case. Matson has a virtual monopoly of the trade.

According to Hawaii, rates are very high, already. The logical conclusion from this set of circumstances is that regulation alone has not controlled rates and that competition might.[9]

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8. Indeed, this was the Board's view in the Grace application Docket No. S-140 where the Commonwealth of Puerto Rico and many shippers and consignees supported Grace's application for additional service. The Board said:

> "We do not question the sincerity of Grace and its supporters, but it must be recognized that shippers, consignees and Chambers of Commerce will naturally favor bigger and better shipping facilities. We are satisfied that these intervenors and the Commonwealth of Puerto Rico sincerely believe that it would be to their advantage to approve Grace's application. On the other hand, they should also consider the possible long-range adverse effects that Grace's entry into the trade might carry with it, such as over-tonnaging, resulting in rate increases, and possible failure of existing carriers to stay in business. These results are not foregone conclusions but caution requires us to weigh them against the short range benefit resulting in the immediate increase in service that would follow from granting Grace's application."

9. The Board's view in the Grace case, Docket No. 140 on the possible long range enervating effects of competition must be distinguished from the Board's view in this case (which is that increased competition would not prejudice the objects and policy of the Act) because the facts and circumstances are materially different in the two cases. In the Grace case, *many* carriers were providing service already, the service was overtonnaged, or nearly so, without Grace's additional service; and, the rates between the

In this connection, for what must be concluded to be the coup-de-grace to Hawaii's position, we find Matson arguing that States will charge sub-standard rates and States arguing that it will hold prices up to that of the leader, Matson. If events proved Matson's prediction more accurate, then Hawaii would have lost the advantage of more service at lower rates if the application were denied (accepting as a predicate that Matson would not lose its effectiveness to compete in the trade since Matson has a virtual monopoly of service, which would not be materially diminished if the application were granted). If, on the other hand, States were to hold up its prices comparable to Matson's, then Hawaii would have the advantage, at least, of increased service.

For these reasons we do not follow the argument of the State of Hawaii (which was made specifically on behalf of shipping interests in Hawaii) to oppose States' application to increase sailings and, therefore, we reject such argument as reason not to authorize the additional sailings.

With respect to other shipper interests, the record shows that Matson discontinued service at San Diego in 1962. States called there four times in 1960 and seven times in 1961. The area has experienced a very marked growth in the past few years, principally because of military activities and the desire of people to live there after retirement. The San Diego area and Hawaii have a common interest arising from important military installations at both places and commercial compatibility. Imperial Valley, east of San Diego, is the seventh most productive agricultural county in the United States. It competes with the San Joaquin Valley, which runs from Bakersfield north to Sacramento, and therefore it is necessary that producers in the Imperial Valley have attractive ocean rates from San Diego to compete with pro-

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mainland and Puerto Rico were relatively low because of substantial competition. These circumstances are contrasted with the States-Matson case here, where Matson has a virtual monopoly of service and rates are considered to be very high by the shipping and consignee interests in Hawaii.

ducers who use more northerly ports. Greater opportunity for States to engage in the Hawaii trade likely would provide sufficient cargo for regular calls at San Diego, coupled with in-and-out Far East cargo. It is possible, even, that regular calls would generate additional cargo in both Hawaii and the Far East. These distinct possibilities not only do not prejudice the objects and policy of the Act, they promote them.

By providing direct service to San Diego, States' service will not only open service to a port lacking service but will aid in the needs of national defense in facilitating movements of military cargo from an important military base to outlying defense areas in the middle of the Pacific Ocean and the Far East.

Increasing the number of sailings will increase the opportunity for generating more combination cargo to Hawaii and the Far East from the mainland and from Hawaii, thus opening up the Pacific Basin to trade in goods similar to both cultures, in many respects. There is no evidence to establish that in the past States has, nor in the future, States will subordinate its obligation to serve the foreign trade for the benefits to be derived in the domestic trade.

States, and its predecessor, have operated for 40 years in the transpacific trade and for the last 12 years in the Hawaii trade. It is party to an operating-differential contract with the Government running to 1978. We consider, as States has maintained, that it makes good business sense to stop at Hawaii "on the way" to and from the Far East. Such by-the-way trade is helpful to shippers on both the mainland and Hawaii. It reduces operating-differential subsidy to States, estimated to be $800,000 annually. The ratio of domestic to foreign trade would not be so disproportionate as to run counter to subsidy concepts which are designed primarily to permit our flag carriers to compete effectively with foreign carriers in the foreign trade. The adverse effect on unsubsidized domestic operators (Matson in this case) is not so

substantial as to seriously affect Matson's ability to compete for available cargo; therefore, we conclude that permitting States to increase its sailings to Hawaii would not be prejudicial to the objects and policy of the Act.[10]

CONCLUSIONS

Based on the full record in Docket No. S-121, the Maritime Subsidy Board finds and concludes that:

1. Section 805(a) is applicable in this proceeding and that, therefore, States Steamship Company is required to have written permission from the Board before it may increase its service between California and Hawaii as proposed;
2. Matson is exclusively a domestic operator within the meaning of Section 805(a) of the Act;
3. States' proposed service would not constitute unfair competition with Matson within the meaning of Section 805(a) of the Act;
4. It would not be prejudicial to the objects and policy of the Act to grant States' application for increased sailings.

SO AUTHORIZED.

By The Maritime Subsidy Board

/s/ JAMES S. DAWSON, JR.
Secretary

10. Unlike the related case with Grace in Docket No. S-140, where the Board concluded, in effect, that Grace would lose its essential character as a subsidized carrier *in the foreign commerce* and where the Board found that Grace's service would over-tonnage the trade, was not needed, and would seriously affect existing domestic carriers in the trade, none of which had the absolutely dominant position in the Atlantic ports-Puerto Rico trade as Matson has here in the California-Hawaii trade.

Appendix C

The full text of Section 101, Merchant Marine Act, 1936, (46 U.S.C. 1101) is as follows:

SECTION 101. It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service on all routes essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States insofar as may be practicable, and (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel. It is hereby declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

The full text of Section 506, Merchant Marine Act, 1936, (46 U.S.C. 1156) is as follows:

SECTION 506. Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Commission that proportion of one twenty-fifth of the construction-differential subsidy paid for such vessel as the

gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed during the preceding year. The Commission may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Commission may determine that such transfer is necessary or appropriate to carry out the purposes of this Act. Such consent shall be conditioned upon the agreement by the owner to pay to the Commission, upon such terms and conditions as it may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Commission as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

The full text of Section 605(a), Merchant Marine Act, 1936, (46 U.S.C. 1175) is as follows:

SEC. 605. (a) No operating-differential subsidy shall be paid for the operation of any vessel on a voyage on which it engages in coastwise or intercoastal trade: *Provided, however,* That such subsidy may be paid on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States or a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and if the subsidized vessel earns any gross revenue on the carriage of mail, passengers, or cargo by reason of such coastal or intercoastal trade the subsidy payment for the entire voyage shall be reduced by an amount which bears the same ratio to the subsidy otherwise payable as such gross revenue bears to the gross revenue derived from the entire voyage. No vessel operating on the Great Lakes or on the inland waterways of the United States shall be considered for the purposes of this Act to be operating in foreign trade.